IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FAMILY COURT APPEAL NO. 64 OF 2003

SMT. ARCHANA BIMAL THAKKAR)
residing at Kumkum, Ground floor
S. V. Road, Vile Parle (W),)
MUMBAI 400 056.) ..APPELLANT

Versus

SHRI BIMAL HARIRAM THAKKAR)
residing at 207/B, 'Sadhana')
Station Road, Wadala,)
Mumbai 400 031.) ..RESPONDENT

Smt. Bhavana Jadhav for appellant

Mr. S.H. Doctor with Ms. J. M. Sidhawa with
Mr. A. S. Doctor i/b Kanga & Co. for respondent

CORAM:-SMT. RANJANA DESAI &
D.B. BHOSALE, JJ.

DATE ON WHICH
JUDGMENT RESERVED: 16/1/2006

DATE ON WHICH
JUDGMENT DELIVERED:17/2/2006

JUDGMENT:-(Smt. Ranjana Desai, J.)

. The appellant has challenged in this appeal judgment and order dated 25/3/03 passed by the Principal Judge of the Family Court, Mumbai in

Petition No. A-1771 of 1998 and Petition No. A-174 of 1998. Appellant is the wife and the respondent is the husband. Petition No. A-1771 of 1998 was filed by the appellant-wife and Petition No. A-174 of 1998 was filed by the respondent-husband. By the impugned order both the petitions were disposed of. For the sake of convenience, we shall refer to the wife as the appellant and to the husband as the respondent.

2. For better appreciation of the rival contentions it is necessary to state in detail certain relevant facts as narrated by the parties in their pleadings.

. There is no dispute about the fact that the appellant and the respondent got married on 4/12/92 as per Hindu vedic rites. The case of the respondent as set out in his first petition being M.J. Petition No. 1472 of 1996 filed for restitution of conjugal rights is that sometime in December, 1990 the respondent met the appellant at the wedding of his friend Mr. Chetan Oza. The appellant was a friend of Chetan’s wife Neeta. Neeta introduced the appellant to the respondent. At that time the appellant was working as a

Nutritionist in Chowpatty Medical Centre at Chowpatty, Bombay. The appellant and the respondent started meeting frequently. Intimate relationship developed between the two. According to the respondent, during the period of courtship they saw several movies, dramas and attended social functions. The appellant used to complain about the cruel nature of her parents and used to promise him that she would make their marriage a great success. She further informed him that in her community parents have to pay huge dowry to get their daughters married. She informed him that she had an affair with one Sunil but she could not marry him because his parents insisted that huge dowry be paid and hence she was in a state of depression. She had, therefore, gone to reside at her uncle's place in Kenya for few months.

3. In or about December, 1991, she had also informed him that she had got engaged to one Ketan from U.S.A. Despite this engagement the respondent continued to meet the appellant. The appellant told him that she would persuade her parents to call off the said engagement. After about three months she informed him that she had succeeded in persuading her parents and her parents had called

off the engagement. As desired by the appellant the respondent approached her parents and had a meeting with them. About two meetings were held thereafter and finally the appellant's parents agreed to give their consent for their marriage and they got married on 4/12/92.

4. Several other allegations are made in this petition about the appellant's alleged objectionable behaviour which includes her illicit relationship with one Dr. Tendulkar, whom it is alleged the appellant wanted to marry because the respondent could not provide luxurious life to her.

5. According to the respondent there was plenty of scope for the appellant to make amends to her wrong decision and lead a happy and peaceful married life with the respondent and in order to call her back through his advocate's letter dated 26/3/96 he called upon the appellant to join her matrimonial home within seven days of the notice. Despite receipt of the said notice the appellant failed to return to her matrimonial home. The respondent in the circumstances submitted that he is entitled to seek a decree of restitution of conjugal rights. It was his further case that the attitude of the

appellant was not only unreasonable but it also amounted to cruelty to the respondent. Her attitude had caused terrible pain and mental agony to the respondent and, therefore, if the appellant was not interested in continuing with the marriage she should put an end to it. According to the respondent in the alternative under the circumstances he was entitled to a decree of divorce.

6. The appellant filed an application for interim maintenance and legal expenses. In that application she denied all the allegations and expressed her willingness to join the respondent and to resume the married life. She claimed that the respondent had in fact deserted her.

7. On 30/6/97, the respondent filed an application in M. J. Petition No. A-1472 of 1996 stating that he had filed the said petition believing that the appellant is his wife because she had represented to him that she was unmarried and a virgin. However, he had recently discovered that on 14/1/87 the appellant was married to one Sunil Anand at Arya Samaj according to Arya Samaj rites and in the register of the said Arya Samaj the said

marriage has been recorded at Serial No. M-5451-87 dated 14/1/87. It was further stated that after the said marriage the appellant maintained secrecy about the said marriage and thus played a fraud and deception upon the respondent and, therefore, the purported marriage between the appellant and the respondent is illegal, null and void as the appellant is not his wife. The respondent, therefore, prayed that the petition for restitution of conjugal rights was not maintainable and hence he may be permitted to withdraw the same. The respondent craved leave to refer to and rely upon the affidavit of Mrs. Neeta Chetan Oza, who had signed as witness for the appellant in her marriage with Sunil K. Anand.

8. On 30/6/97 the Family Court permitted the respondent to withdraw the said petition with liberty to file a fresh petition.

9. On 6/1/98, the respondent filed M.J. Petition No. A-174/98 praying that the marriage between the appellant and the respondent be annulled by a decree of nullity under Section 12(1)(c) of the said Act or in the alternative the said marriage be dissolved by a decree under Section 13(1)(ia) and

(ib) of the said Act.

10. In this petition the petitioner reiterated some of the allegations made in his earlier petition and added certain other allegations of cruelty. The respondent highlighted the alleged illicit relationship between the appellant and Dr. Tendulkar. He referred to first notice dated 26th March, 1996 sent to the appellant calling upon her to return to her matrimonial home and stated that inspite of the said notice the appellant failed to join the matrimonial home and instead filed an application for maintenance. He stated that on 12th June, 1997, he came to know from his friend's wife Neeta that the appellant had married Sunil Anand and on making further inquiries he was able to get marriage certificate dated 4th January, 1987. According to him these facts came to his knowledge only when the appellant deserted him somewhere in August, 1995 and, thereafter when he filed petition for restitution of conjugal rights. He, therefore, withdrew the said petition on 30th June, 1997. According to the respondent after the withdrawal of the petition, the appellant vide her advocate's letter dated 7/7/97 informed him about the fact that she had divorced Sunil K. Anand.

The respondent contended that factum of the earlier marriage and subsequent decree of divorce were cleverly concealed by the appellant from the respondent and, therefore, since his consent to the marriage was obtained by the appellant by fraud he was entitled to a decree of nullity. The respondent also contended that even in the marriage certificate the appellant had shown her status as a spinster and not a divorcee which clearly establishes that she has practised fraud on the respondent. Thus it was the case of the respondent in this petition that the appellant's conduct in the house after marriage was such as to amount to cruelty entitling him to a decree of divorce. Besides the fraud practised by her would also entitle him to a decree of nullity of marriage under Section 12(1)(c) of the said Act.

11. On 7/9/98 the appellant filed M.J. Petition No. A-1771/98 for restitution of conjugal rights in which she contended that the appellant, who was then a divorcee, married the respondent on 4/12/92 as per Hindu vedic rites in Mumbai. She stayed with the respondent at their matrimonial house in a joint family. The matrimonial house was a small flat where the respondent's elder brother's family,

and his parents were also residing. At the time of marriage it was decided that the respondent would buy a separate house. However, the respondent was not keen on buying a separate house. Afterwards he left the appellant at her parent's house and requested them to allow her to stay with them till he gets a separate residential accommodation. Thus from 18/8/95 the appellant started living with her parents. According to the appellant she tried her level best to go back to her matrimonial home. However, the respondent was not cooperating with her. He did not try to get a separate residence for her though he had promised to do so. According to the appellant the respondent without just cause asked the appellant to stay with her parents and he failed and neglected to take her back to the matrimonial home and thus from 18/8/95 the respondent had completely withdrawn from her society and refused to cohabit with her. It was her case that she was always ready and willing to live and cohabit with the respondent. In the circumstances she prayed for a decree of restitution of conjugal rights.

12. The Family Court heard both the petitions together. The appellant examined herself. The

respondent also stepped in the witness box. In support of his case he examined his brother Ashok Thakker and his friend Murli C. Gupta. After perusing the evidence on record, the Family Court came to a conclusion that the appellant had failed to prove that the respondent had without any reasonable excuse withdrawn from her society. The Family Court held that the appellant is not entitled to a decree of restitution of conjugal rights. The Family Court further held that the respondent had proved that his consent for the marriage was obtained by the appellant by fraud and, therefore, the respondent was entitled to a decree of nullity. In view of this finding the Family Court held that the other issues namely whether the appellant had treated the respondent with cruelty; whether the appellant has deserted the respondent without any reasonable excuse for a continuous period of not less than two years i.e. immediately preceding presentation of the petition, do not survive. There is, therefore, no question of the respondent being entitled to a decree of divorce on that count. The Family Court held that the appellant is not entitled to claim maintenance from the respondent. In the circumstances, the petition filed by the respondent was decreed. The

marriage between the appellant and the respondent was annulled by decree of nullity. The petition filed by the appellant was dismissed. This judgment and order is challenged before us by the appellant-wife.

13. We have heard at considerable length Mrs. Bhavana Jadhav, the learned counsel appearing for the appellant and Mr. S. H. Doctor learned Senior Counsel with Mrs. J. N. Sidhawa for the respondents. With the assistance of the learned counsel, we have perused the evidence on record.

14. Mrs. Jadhav, the learned counsel for the appellant contended that the impugned judgment and order is perverse and deserves to be set aside. She submitted that the Family Court erred in coming to the conclusion that the appellant had played a fraud on the respondent by not disclosing to him that she was a divorcee at the time of her marriage with him. She submitted that it is the case of the appellant as stated in both the petitions that the appellant and the respondent met for the first time in the marriage of one Chetan Oza, whose wife Neeta was the appellant’s friend. It is not disputed that there was two years’ period of courtship

before the marriage. It is, therefore, inconceivable that the appellant would not disclose the fact that she was a divorcee to the respondent. The learned counsel contended that Mrs. Oza being a friend of the appellant would obviously know about her marriage and divorce and, therefore, it is impossible that she would not inform the respondent about the appellant's first marriage and divorce. She submitted that this would be the natural conduct of any friend . The learned counsel pointed out that the Family Court wrongly placed reliance on the marriage certificate to come to a conclusion that the appellant had played a fraud on the respondent. She submitted that even, if it is assumed that the said form was partly filled by the appellant, against the word unmarried there is only a tick mark. It cannot be said that the tick mark was made by the appellant. In any case that tick mark would not lead to an inference of fraud. The learned counsel submitted that apart from this marriage certificate there is no other cogent and acceptable evidence to support the respondent's case of fraud. The learned counsel further urged that it is the case of the respondent that prior to the marriage he had met her parents and had meetings with them in their house. It is

not possible for the parents to keep the fact of divorce concealed from the respondent. She submitted that it is well settled that fraud has to be proved by leading cogent and acceptable evidence. Material particulars of fraud have to be given. Merely on the basis of a tick mark made in the marriage certificate fraud cannot be proved. The learned counsel contended that the evidence led by the respondent is far from satisfactory. In fact the respondent's brothers' evidence clearly negatives the respondent's case that the appellant had played fraud on him. The learned counsel contended that the Family Court overlooked the cogent evidence of the appellant. She submitted that the Family Court erred in holding that the appellant had failed to prove that the respondent had without reasonable excuse withdrawn from her society. She submitted that in the circumstances the impugned judgment and decree be set aside. In support of her submissions the learned counsel relied on **Perminder Charan Singh v. Harjit Kaur 1 (2003) DMC 742 (SC)** and **Mohan Charan Swain v. Ashvini Kumar Swain II (2002) DMC 693 (DB)**.

15. Mr. Doctor the learned Senior Counsel appearing for the respondent on the other hand

contended that the Family Court which had the opportunity to observe the demeanour of the witness has upon a proper scrutiny of the entire evidence accepted the respondent's evidence as credible and rejected the appellant's evidence as being not credible. It has severely commented on the conduct of the appellant. It has noted that the appellant was either avoiding to give answers or was impudently answering the questions. She was found prevaricating. At several places the appellant has contradicted herself. She has stated that she was not paying income-tax after marriage when infact she was found paying it. Whereas in the court she has stated that she did not show legal documents of divorce to the respondent because he trusted her, in the advocate's notice dated 7/7/97 she has stated that legal documents were shown to the respondent prior to the marriage. Mr. Doctor pointed out that in her advocate's notice dated 7/7/97 the appellant has stated that the respondent had filled the marriage registration form and she had merely signed it. But in the court she has admitted that she had partly filled it. Therefore, the appellant is not a witness of truth and the observation made by the trial court is justified. Relying on **Sarju Pershad v. Raj Jwaleshwari Pratap**

Narain Singh & Ors., S C R 78. Mr. Doctor contended that Family Court's assessment of the evidence and its opinion on the credibility of a witness cannot be lightly brushed aside.

16. Mr. Doctor further contended that allegation of fraud is established beyond doubt. He submitted that if the respondent was aware of the appellant's first marriage and divorce as alleged by her, he would have applied for a decree of nullity instead of filing a petition for restitution of conjugal rights. By suppressing knowledge of decree of divorce, the respondent could not have got any mileage. The genuine nature of the respondent's case is established by the fact that he initially filed a petition for restitution of conjugal rights and only when he got to know about the earlier marriage and divorce of the appellant that he moved for a decree of nullity. If he wanted to cook up a story he could have done it in the first petition itself.

17. Mr. Doctor relied on judgment of the Delhi High Court in **Rajinder Singh v. Smt. Pomilla, AIR 1987 Delhi 285** where the wife's plea was that the husband had not disclosed factum of his previous

marriage to her. The Delhi High Court on facts held that wife's consent was obtained by fraud and she was therefore, entitled to annulment of marriage under clause (c) of sub-section (1) of Section 12 of the Hindu Marriage Act. The Delhi High Court held that pre-marital status of a party is a material fact which the other party must know before imparting consent for marriage. For the similar proposition reliance was placed on **Sh. Brijinder Bir Singh v. Hst. Vinod alias Parminder AIR 1995 Punjab & Haryana 42.**

18. Mr. Doctor contended that the appellant has admitted in her evidence that she had filled in the marriage registration form. The tick mark put by her against the words unmarried is significant. She has not been able to give any acceptable explanation for this. Mr. Doctor further submitted that it is the case of the appellant that Neeta Oza and her husband had also told the respondent that she was a divorcee. Therefore, she should have examined Neeta Oza, which she has failed to do. Mr. Doctor further pointed out that the appellant's evidence does not indicate that Neeta Oza met the respondent on a number of occasions after she introduced him to the

appellant. Appellant has stated that she was not aware as to how many times Neeta Oza met the respondent after she introduced him to the appellant and at one stage she has stated that they did not meet at all. Therefore, assuming that Neeta Oza knew that the appellant was a divorcee it would be wrong to infer that she must have told the respondent about it.

19. Mr. Doctor contended that if as contended by the appellant she was always ready and willing to join the respondent she ought to have submitted to the decree of restitution in the petition filed by the respondent instead of filing application for maintenance. Mr. Doctor submitted that the Family Court has correctly held that the appellant has failed to prove that the respondent has, without any reasonable excuse withdrawn from her society. The appellant has admitted that the respondent took her to Vashi and showed her flats and that she was not agreeable to stay at Vashi. There is no evidence on record to show that the appellant tried to contact the respondent or tried to return to the matrimonial home. Mr. Doctor submitted that in the circumstances no interference is necessary with the Family Court’s judgment and it should be

confirmed.

20. In our opinion, the finding recorded by the Family Court that the respondent has proved that his consent for marriage was obtained by fraud is clearly erroneous, illegal and contrary to the evidence on record. The Family Court has also held that the appellant has failed to prove that the respondent has without any reasonable excuse withdrawn from her society. The Family Court has observed that in view of these findings there is no need to record any findings on the other issues. We are, therefore, not required to go into other issues.

21. The judgment cited by Mr. Doctor stating that premarital status of a person is a material fact and in the circumstances of a case obtaining consent of a party by not disclosing it may entitle such a person to annulment of marriage on the ground of fraud, need not be referred to because there is no dispute about this proposition. The question is whether any fraud was practised in this case. We have already stated that, we are of the opinion that the conclusion drawn by the Family Court that fraud was practised is erroneous. We

say so because we feel that the appellant is not wrong when she states in the court that she had informed the respondent prior to the marriage that she was a divorcee. The Family Court has found that the appellant is not a trustworty witness as she was found prevaricating. If we have to accept the appellant's evidence on the above aspect despite this observation we must first meet Mr. Doctor's contention based on the judgment of the Supreme Court in **Raja Jwaleshwari's case (supra)**.

22. In that case the appellant therein had filed a suit against the respondent therein to recover money by enforcement of a simple mortgage bond. The trial court made a preliminary decree for sale in favour of the plaintiff for recovery of the money. The defendant filed an appeal to the Allahabad High Court. The High Court reversed the judgment of the trial court. The plaintiff carried an appeal to the Supreme Court. The Supreme Court allowed the appeal holding that the finding of the trial court on the question of attestation is perfectly consistent with the circumstances and probabilities of the case and the learned Judge did not omit anything which ought to have been present in his mind in coming to a conclusion. The Supreme

Court observed that the evidence on record taken as a whole fully supports the finding and the High Court had reversed it on totally inadequate grounds. While coming to this conclusion the Supreme Court stated what should be approach of the appellate court while appreciating evidence in an appeal. The relevant paragraph reads thus:

> "The question for our consideration is undoubtedly one of fact, the decision of which depends upon the appreciation of the oral evidence adduced in the case. In such cases, the appellate court has got to bear in mind that it has not the advantage which the trial Judge had in having the witnesses before him and of observing the manner in which they deposed in court. This certainly does not mean that when an appeal lies on facts, the appellate court is not competent to reverse a finding of fact arrived at by the trial Judge. The rule is - and it is nothing more than a rule of practice - that when there is conflict of oral evidence of the parties on any matter in issue

> and the decision hinges upon the credibility of the witnesses, then unless there is some special feature about the evidence of a particular witness which has escaped the trial Judge's notice or there is a sufficient balance of improbability to displace his opinion as to where the credibility lies, the appellate court should not interfere with the finding of the trial Judge on a question of fact."

23. We shall examine this case in the light of the above observations. In this case there is a conflict of oral evidence of the parties on the question whether the appellant had disclosed to the respondent that she was a divorcee when she married him. The Family Court found that the appellant was prevaricating. The Family Court had the advantage of observing her demeanour and at some stage it has adversely commented on her and, therefore, this court will have to be slow in displacing the Family Court's observations. Unless weighty reasons are available such a course cannot be adopted. In such circumstances we can upset the Family Court's finding if we find that there is some special

feature about the evidence of a particular witness which has escaped the Family Court's notice. We can interfere with the Family Court's finding, if there is a sufficient balance of improbability to displace its opinion as to where the credibility lies.

24. We have no manner of doubt that in this case on the question of disclosure of pre-marital status there is sufficient balance of improbability to displace the opinion of the Family Court that credibility lies with the respondent. What has weighed with the Family Court is the tick mark in the marriage registration form against the word "unmarried" allegedly made by the appellant. There is no clear indication in the evidence that the tick mark was made by the appellant. But assuming that there is some inconsistency in her evidence on this aspect, in our opinion, this circumstance is not fatal to the case. We cannot hold that fraud is established on the basis of the said tick mark. Sound and acceptable evidence is necessary for inference of fraud. We do not find that particulars of fraud have been established by cogent evidence.

25. It is the case of the appellant as well as the respondent in their pleadings which we have on purpose reproduced in detail and in their evidence that they met in the wedding function of Ms. Neeta Oza and Chetan Oza; and that the appellant is the friend of Ms. Neeta Oza and the respondent is the friend of Chetan Oza. It is the appellant's case that she was a close friend of Neeta. She was a bride's maid in her marriage and Neeta was a witness to her first marriage and divorce. According to her Mr. and Mrs. Oza had informed the respondent that she was a divorcee. Respondent's witness Murli Gupta has accepted that appellant was the best friend of Neeta and she was a bride's maid in Neeta's marriage. In her affidavit to which we shall soon advert Neeta Oza has admitted that appellant was married to Sunil on 14/1/87 at Arya Samaj and she was a witness to the said marriage. This lends support to the appellant's case. Therefore, Neeta Oza knew about the appellant's first marriage. A legitimate and natural inference from this is that as stated by the appellant Neeta Oza knew about the appellant's divorce also. Her attempt to feign ignorance about the appellant's divorce has not pursuaded us to hold that she did not know about the divorce. If

she had stepped in the witness box things would have been different. But Neeta has not given evidence in the court. Appellants first marriage took place on 14th January, 1987. To this marriage admittedly Neeta was a witness. The divorce took place on 21/12/89 and the appellant was then staying with her parents. During this time friendship between the appellant and Neeta continued and in Neeta's wedding in December, 1990 she introduced the appellant to the respondent. It is impossible to believe that during this period Neeta did not know that her best friend was divorced. If Neeta knew about appellant's divorce, it is unlikely that she would not tell her husband about it. Therefore, Chetan Oza must also be posted with knowledge of this fact.

26. The appellant has further stated that Mr. & Mrs. Oza introduced her to the respondent. They met at the marriage of Neeta and Chetan Oza. After marriage she had gone for dinner with them where they met the respondent and all three of them dropped her at her residence. Thereafter she and the respondent met each other through Neeta Oza and, at that time, they went for dinner. Therefore, it appears that the appellant and the

respondent were in touch with Mr. & Mrs. Oza. Mr. Doctor pointed out that at one stage the appellant has stated that during the period she was meeting the respondent, Ms. Neeta Oza did not meet the respondent. We do not find that this statement has any adverse effect on the appellant's case. Even assuming that after the respondent and the appellant started meeting regularly Mrs. Oza did not meet the respondent, no inference can be drawn from this that Mr. & Mrs. Oza did not tell the respondent that the appellant was a divorcee. If there was some contact between them as good friends they are bound to inform this fact to the respondent. It is pertinent to note that Murli Gupta has stated that Neeta and her husband knew that the appellant and the respondent were planning to get married. Since they were instrumental in introducing the appellant to the respondent their natural conduct would be to warn the respondent.

27. There is another very sound reason why we have drawn this conclusion. In his application for withdrawal of the petition for restitution of conjugal rights, the respondent has stated that on 14/1/1987, the appellant was married to Sunil at Arya Samaj and the appellant had maintained secrecy

about the said marriage. He has prayed for withdrawal of his petition for restitution of conjugal rights on the ground that by reason of the fact that the appellant was married to Sunil, her marriage with him was illegal, null and void. Significantly he has not stated how and when he got to know about this fact. In this application, he has craved, leave to refer to and rely upon the affidavit of Ms. Neeta Oza, to which, we have already made a reference.

28. A copy of the affidavit of Ms. Neeta Oza has been produced before us. This affidavit is dated 30/6/1997. In her affidavit, Ms. Neeta has stated that she knows the appellant for last about 13 years. The appellant was studying with her in Nirmala Niketan College. She has further stated that the appellant was married to one Sunil on 14/1/1987 at Arya Samaj and that she was a witness to the said marriage. She has further stated that to the best of her knowledge and information, the appellant has not taken divorce and she still continues to be the wife of Sunil. She has ended the affidavit by saying that the above information is true to her knowledge and she believes the same to be true. It is important to note that in this

entire affidavit, Ms. Neeta Oza has not stated whether she had informed the respondent that the appellant was married to Sunil on 14/1/1987. If she had not informed this fact to the respondent, then she should have made a categorical statement to that effect in her affidavit. Her silence on this aspect and her feigning ignorance of the appellant's divorce cast a shadow of doubt on her credibility. It is pertinent to note that it is the respondent who has produced Ms. Neeta Oza's affidavit. Therefore, Neeta Oza is obviously supporting the respondent. The respondent should have, therefore, examined her to bring on record the fact that Ms. Neeta Oza and Chetan Oza did not inform him that the appellant was married to Sunil at the time when she married him. Ms. Neeta Oza's evidence would have gone a long way to support the respondent. Her half hearted non-committal and evasive affidavit and her not stepping in the witness box has adversely affected the credibility of the respondent's case. In the circumstances of the case, it is wrong to put the burden of examining Neeta Oza on the appellant. We are, therefore, of the opinion that the appellant's case that Mr. and Mrs. Oza did inform the respondent that the appellant was a divorcee when she married

him is probabilised. We find no reason to disbelieve the appellant on this aspect because the other evidence on record also supports this conclusion reached by us.

29. It is also admitted in the pleadings as well as in the evidence that the respondent and the appellant had a two years courtship prior to their marriage. During this period, they met frequently. They visited several places together. The appellant confided in the respondent many aspects of her personal life which included the alleged cruel nature of her parents; her affair with Sunil and that she was engaged to one Ketan. Despite the said engagement, the respondent continued to meet the appellant. Ultimately, the appellant's parents were persuaded to call off the appellant's engagement with Ketan. If the appellant had confided everything in the respondent including her affair with Sunil, it is inconceivable that she would not have told him that she had married and divorced Sunil. If she wanted to hide her marriage with Sunil, she would not have informed the respondent that she had an affair with Sunil. We, therefore, find no reason to disbelieve her when she says that she had informed the respondent that

she had married and divorced Sunil.

30. It is also an admitted position that the respondent had a meeting with the appellant's parents. The respondent informed them about his family background. Thereafter, there were two more meetings and the appellant's parents finally agreed to give consent to their marriage. The appellant has stated that she disclosed the fact that she was a divorcee in her house in front of her parents also. The respondent has admitted in his evidence that when his mother returned from abroad, he and his brother Ashok, his brother's wife, his sister Geeta and her husband had gone to the appellant's parent's place to discuss about the marriage. It is improbable that the appellant's parents would not inform the respondent and his family that the appellant was a divorcee. The respondent has nowhere levelled any allegations against the appellant's family. In fact, the appellant's family appears to be a very reputed family. The appellant has stated in his evidence that he wanted to marry a girl from a decent family and that is why he married the respondent. It is inconceivable therefore, that the parents would not disclose the fact that their daughter was a divorcee, to the

prospective son in law. This conclusion of our's is fortified by the evidence of Ashok Thakker - the brother of the respondent, who has accepted that he had been to the house of the appellant to discuss the marriage plans. He has stated that he came to know that the appellant was earlier married prior to her marriage with the respondent, when she left the house and when his brother filed petition for restitution of conjugal rights. As per the case of the respondent, the appellant left the house in August, 1995 and the petition for restitution of conjugal rights was filed on 6/8/1996. But the petition for restitution of conjugal rights makes no reference to the said marriage. Therefore, truth is tried to be suppressed. After realising that he has committed a blunder. Ashok Thakker has made an effort to salvage the situation by denying what he had stated in the examination-in-chief in the cross-examination. But that denial does not inspire confidence. Therefore, in our opinion, the appellant's case that she had told the respondent about her first marriage and divorce and the respondent's family was also aware of this fact is true and if it is tested on the touchstone of probabilities it appears to be genuine.

31. It is true that we do not have the advantage of observing the demeanour of the appellant. But we do feel that the appellant's statement that the respondent and his family knew about her premarital status is correct and is supported by circumstances on record. We feel that the Family Court has failed to note several inevitable, logical and natural inferences which can be legitimately drawn from the attendant circumstances of the case. It has failed to discuss the evidence of Ashok Thakker which clearly indicates that the respondent's family had knowledge of the fact that the appellant was a divorcee. There is sufficient balance of improbability on this question to dispute the Family Court's opinion as to where credibility lies.

32. It was argued that, if the respondent wanted to cook up a story he would have done that when he filed the first petition for restitution of conjugal rights. We do not think that the respondent can proclaim that he was unaware of the appellant's first marriage and divorce on the basis of this fact. In the first petition the alternative prayer was for divorce. When there are other circumstances indicating that the respondent

had knowledge, this fact would not help him.

33. In the circumstances, we feel that the family court erred in returning the finding that the appellant has committed fraud. We will have to, therefore, set aside this finding of the Family Court. The other finding returned by the Family Court is that the appellant had failed to prove that the respondent had without any reasonable excuse withdrawn from her society. On all other issues, the Family Court has not thought it fit to give any finding. Since we are setting aside the Family Court's finding that the respondent had proved that his consent for marriage was obtained by fraud, we will have to remand this matter to the Family Court with a direction to it to reassess the evidence. We do not wish to express any opinion on the question whether the Family Court has rightly or wongly come to a conclusion that the appellant had failed to prove that the respondent has without any reasonable excuse withdrawn from her society. But it is possible that the family court was influenced by its finding on the question of fraud while arriving at this finding. We, therefore, feel that the family court should be directed to answer all other issues in the light of our above

observations, afresh. Hence, we pass the following order :

O R D E R

a) The impugned judgment and order dated 25/3/2003 passed by the Family Court in Petition A-1771 of 1998 and Petition No.A-174 of 1998 is set aside.

b) It is clarified that this court has set aside on merit only the findings recorded by the Family Court that the petitioner’s consent for marriage is obtained by fraud and the petitioner is entitled to a decree nullity.

c) We make it clear that except these issues no other issues were considered by us on merits.

d) We remand the matter to the Family Court.

e) We direct the Family Court to reassess the evidence and return its findings on other issues and dispose of the petitions in accordance with law

within three months from the date of receipt of this order by it.

f) It will be open for the parties to adduce additional evidence on other issues, if they so desire. The Family Court will take it on record in accordance with law. However, the entire exercise must be completed within three months as directed by us hereinabove.

g) Office is directed to send a copy of this judgment to the Family Court forthwith.

h) Appeal is disposed of in the aforestated terms.

(SMT. RANJANA DESAI, J.)

(D.B. BHOSALE, J.)